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No. 95-526

In The

Supreme Court of the United States

October Term, 1995

ALLAN C. ALDRIDGE, DENNIS W. PETERSON and HENRY A. SIERON,

Petitioners,

vs.

LILY-TULIP, INC., SALARY RETIREMENT PLAN BENEFITS COMMITTEE and FORT HOWARD CUP CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the law that existed prior to October 16, 1987 required a plan sponsor to add funds to an underfunded defined benefit pension plan to pay for contingent early retirement subsidies ("CERS") on the plan's termination?

2. Whether a plan sponsor may terminate a defined benefit pension plan, which plan reserves to "the Company" the right to terminate the plan, by unanimous board resolution, coupled with timely notice to the participants and to the Pension Benefit Guaranty Corporation ("PBGC"), or whether a plan amendment is also required?

LIST OF PARTIES

Respondents are the Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee and Fort Howard Cup Corporation ("Fort Howard Cup"). Fort Howard Cup was sold to and merged into Sweetheart Cup Company Inc. ("Sweetheart"). Sweetheart's parent is Sweetheart Holdings Inc. Respondents are referred to collectively in these proceedings as "Lily."

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COUNTER-STATEMENT OF THE CASE

Respondents rely on the Statement of Facts as set forth in the decision of the Eleventh Circuit in the most recent of the two appeals before that court, to wit: *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee*, 40 F.3d 1202 (11th Cir. 1994) (hereinafter "*Aldridge II*"). (A3-6) Petitioner has incorporated that statement in his petition (pp. 2-9), but has embellished the facts with a multitude of bracketed editorial comments. (*See id.*) Respondents object to the bracketed materials because they (i) are *de hors* the record,[1] (ii) consist of argument and rhetoric[2] and/or (iii) are flatly wrong.[3]

Procedurally, as noted by the Eleventh Circuit (A6-9), the ERISA claims in this case were first decided by the Southern District of Georgia in 1990. *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee*, 741 F. Supp. 906 (S.D. Ga. 1990). On interlocutory appeal, the

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[1] Petitioner's references to the purported values of certain of his claims are a prime example.

[2] For example, petitioner asserts that the PBGC made misrepresentations to the Eleventh Circuit in its *amicus* filings.

[3] *Id.* The most significant error in Petitioner's Statement of the Case is his repeated claim that Lily "eliminated" the CERS. (Pet., pp. 3, 5, 7) It did no such thing. As the Eleventh Circuit held in 1992 (A38-39), Lily never eliminated or reduced the CERS -- they are still there and would be paid if the Lily Plan's assets were sufficient to provide them. Unfortunately, "in Lily's case, they were not funded at all." (*Id.*)

Eleventh Circuit decided, *inter alia*, the ERISA § 204(g), 29 U.S.C. § 1054(g), claims relating to the CERS in *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee*, 953 F.2d 587 (11th Cir. 1992) (A27-43) (hereinafter *"Aldridge I"*). Rehearing and Rehearing *en banc* in *Aldridge I* was denied on April 9, 1992. (*See* A-27)

Following the decision in *Aldridge I*, the parties cross-moved for summary judgment before the district court. Petitioner argued that the Lily Plan was not terminated because the Plan had inadequate termination "procedures" and because Lily did not adopt an amendment terminating the Plan. After inviting the parties to submit proposed decisions, the district court adopted Petitioner's. (A44, n.1) This second district court decision was reversed by *Aldridge II*.

SUMMARY OF THE ARGUMENT

Certiorari is not warranted as to *Aldridge I* because the issues Petitioner invites the Court to decide relate to the interpretation of a plan sponsor's funding obligations upon a plan termination in accordance with the law in effect prior to the enactment of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987)("1987 Act"). Lily, Petitioner, the PBGC and the Eleventh Circuit all agree that had this termination occurred after the effective date of the 1987 Act, Lily would have been required to add funds to the Lily Plan to pay for the CERS. Thus, any further proceedings regarding this Plan could only impact terminations that occurred prior to October 16, 1987.

Equally important, there is no conflict between the ways in which the Eleventh Circuit analyzed ERISA -- including ERISA § 204(g), 29 U.S.C. § 1054(g), and the virtually identical IRC § 411(d)(6) and Lily Plan § 8.1 -- regarding whether the sponsor was obligated to add funds to provide for the CERS, and the decisions of any other Court of Appeals or this Court. In fact, the decision in *Aldridge I* is in harmony with this Court's decision in *Mead Corp. v. Tilley*, 490 U.S. 714 (1989).

Certiorari is inappropriate as to *Aldridge II* because this Court, in *Curtiss Wright Corp. v. Schoonejongen*, ___ U.S. ___, 115 S. Ct. 1223 (1995), has already resolved the conflict that existed among certain circuits as to adequate plan language. Thus, this Court has settled the question answered below, *viz:* whether plan language that reserves to "the Company" the right to amend or terminate a defined benefit pension plan adequately sets forth procedures for such

amendment or termination. (A19-22) With this pivotal question already addressed by this Court earlier this year, *certiorari* is inappropriate. In addition, the holding that a plan may be terminated without a plan amendment is entirely sound and in harmony with the decisions of every court that has addressed the issue.

Finally, Petitioner fails to establish that any of the criteria set forth in Rule 10 of the Supreme Court rules are met on this Petition. The decisions below are not in conflict with the decision of any other Court of Appeals nor are they in conflict with the decision of a state court of last resort. The Court of Appeals did not depart from the accepted and usual course of judicial proceedings. In sum, there is simply no reason for this Court to grant the writ.

REASONS FOR DENYING THE WRIT

Aldridge I addresses the law in effect on December 31, 1986, *i.e.*, the law governing terminations that occurred during the "window" in time in the evolution of ERISA between 1984, when the Retirement Equity Act of 1984, P.L. 98-397, 98 Stat. 1426 (1984), was enacted, and October of 1987, when the 1987 Act became effective. Petitioner, Respondents, the Eleventh Circuit (A37-38) and every other court that has addressed the issue agree that had the Lily Plan terminated after the effective date of the 1987 Act, Lily would have been obligated to add funds to the Lily Plan to pay the CERS. As a result, any further analysis of the Eleventh Circuit's decision regarding ERISA's funding requirements upon the termination of a plan prior to the effective date of the 1987 Act *ipso facto* would be limited to plans that terminated more than eight years ago. In other words, additional analysis of the CERS issue would have virtually no significance for other cases. This factor alone counsels against granting *certiorari*.

Furthermore, there is no conflict between *Aldridge I*'s analysis of the CERS issue -- including its analysis of ERISA § 204(g), 29 U.S.C. § 1054(g), and the virtually identical provisions of IRC § 411(d)(6) and Lily Plan § 8.1 -- and that of any other circuit court or of this Court. *Aldridge I* is in complete harmony with *Mead Corp. v. Tilley*, 490 U.S. 714 (1989). In *Mead*, this Court addressed the question whether certain plan assets of an overfunded plan may revert to a plan sponsor before unreduced early retirement benefits are paid to participants. *Aldridge I*, which considered *Mead* at length, was decided in accordance with *Mead* in the context of an underfunded plan. (A36-37) As the lower court explained:

> In the instant case, the question is not whether and when plan funds may revert to the sponsor, but rather whether ERISA requires the sponsor to *add* funds to the plan upon termination.

(A-36 (emphasis in original))

Similarly, no circuit court has come to a contrary conclusion with respect to 1986 law. The cases upon which Petitioner relies merely note that certain plan terms or collective bargaining agreements may give rise to claims against the employer beyond those available against the plan's assets. *See, e.g., Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498 (2d Cir. 1995); *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994); *United Steel Workers v. North Bend Terminal*, 752 F.2d 256, 259 (6th Cir. 1985).[4] The decision below, however, specifically considered this undisputed principle and concluded that since the Lily Plan's terms were identical to ERISA's requirements, the Lily Plan afforded Petitioner no benefits beyond those required to be paid under ERISA. (A34-35)

Petitioner also claims that *certiorari* should be granted because the Court allegedly engaged in statutory construction in conflict with Supreme Court precedent when it mentioned that the 1987 Act changed the law to require thereafter that plan sponsors add funds to underfunded plans to pay for all

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[4] Petitioner's assertion that the decision below is in conflict with other decisions of the Eleventh Circuit and of district courts, although also incorrect, is irrelevant. *See* Sup. Ct. Rule 10.1.

accrued benefits, including the CERS. In support of this supposed conflict, Petitioner relies on *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 840 (1988), which mentions that subsequent congressional enactments "do[ ] not control the issue" of statutory construction of earlier statutes. *Id.* Since *Mackey* does not preclude such an analysis and since reliance on the 1987 Act was only one of several bases for reaching the conclusion below,[5] there is no "conflict," and *certiorari* should be denied.

As for *Aldridge II*, Petitioner challenges the Eleventh Circuit's conclusion that the Lily Plan's procedures for amendment and termination did not preclude the Plan's amendment or termination. Petitioner had argued below that no amendment of the Plan could occur until after the Plan's procedures were amplified. In disagreeing, *Aldridge II* acknowledged that there was a split in the circuits as to what plan language would be adequate. (A21) That split, however, has since been resolved by this Court's decision in *Curtiss Wright Corp. v. Schoonejongen*, ___ U.S. ___, 115 S. Ct. 1223 (1995). With the circuit split resolved earlier this year, there is simply no reason to grant *certiorari* on this ground.

Petitioner also challenges the holding in *Aldridge II* that the termination of a defined benefit pension plan is an event distinct from its amendment, and that such a plan can be terminated by Board resolution coupled with notice to the

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[5] *Aldridge I* also examined the plain language of the controlling law, the decisions of this Court, the decisions of other circuit courts and the views of the PBGC. (*See* A35-39)

PBGC and to the participants. (A16-19) These holdings are not only sound, but are consistent with every decision which has addressed these questions (*see cases collected at* A17, A19), as well as the *amicus* position of the PBGC. (A88-92) There is, thus, no conflict and no reason to grant *certiorari*.

Furthermore, Petitioner claims that *certiorari* should be granted because *Aldridge II* rejected his assertion that the termination was invalid because portions of Amendment No. 2 were violative of ERISA § 204(g), 29 U.S.C. § 1054(g). *Aldridge II* held that the remedy for the violative portions of Amendment No. 2 was the adoption of Amendment No. 3, not a nullification of the termination. (A4, 6-7, 19) Since no court has held that a participant is entitled to undo a termination under circumstances even remotely akin to those in this case, there is no conflict and, thus, no reason to grant *certiorari*.

Petitioner also asserts that *certiorari* is warranted because Amendment No. 3 violates ERISA § 204(g), 29 U.S.C. § 1054(g), which prohibits retroactive amendments that cut back accrued benefits. While Amendment No. 3 was retroactive, it did not cut back accrued benefits. As the Eleventh Circuit correctly held (and as Petitioner concedes) Amendment No. 3 increased accrued benefits by restoring the Lily Plan to its pre-Amendment No. 2 actuarial and social security offset assumptions. (A6) The cases Petitioner relies on to attempt to demonstrate a conflict on this issue are in concert with the concept that only amendments that cut back accrued benefits are violative of ERISA. Indeed, in each case cited by Petitioner, the court was careful to point out that the retroactive amendments at issue were violative of § 204(g), 29 U.S.C. § 1054(g), because they cut back

accrued benefits. *See Smith v. National Credit Union Admin. Bd.*, 36 F.3d 1077, 1081 (11th Cir. 1994); *Production Maintenance Employees Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1403-04 (7th Cir. 1992); *Collins v, Seafarer's Pension Trust*, 846 F.2d 936, 938-40 (4th Cir. 1988). There is, thus, no split in authority on this issue and, accordingly, no reason for this Court to grant the petition in this matter.

Finally, Petitioner claims that *certiorari* should be granted because the Eleventh Circuit accorded the PBGC too much deference. The Circuit Court accorded the PBGC the deference this Court has indicated is appropriate, *see Mead Corp. v. Tilley*, 490 U.S. 714 (1989), and no more. According appropriate deference to administrative agencies simply does not warrant this Court's review.

In sum, none of the reasons articulated in Rule 10 of the Supreme Court Rules is implicated in either *Aldridge I* or *Aldridge II*, and *certiorari* should be denied.

CONCLUSION

The decisions below involve well-settled principles of law that are not in conflict with, nor do they represent departures from, the usual course of judicial proceedings. Accordingly, Respondents request that the petition be denied.

Respectfully submitted,

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